83-432

Office-Supreme Court, U.S.
FILED
SEP 14 1983
ALEXANDER L. STEVAS,

No._____

IN THE

Supreme Court of the United States

October Term, 1983

ROBERT H. GULLETT,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW BY RULING THAT THE DISTRICT COURT HAD NOT ABRIDGED DEFENDANT-APPELLANT'S SIXTH AMENDMENT CONFRONTATION RIGHTS BY IMPERMISSIBLY LIMITING THE CROSS-EXAMINATION OF ONE OF THE GOVERNMENT'S PRINCIPAL WITNESSES WHO, AFTER TESTIFYING UNDER A GRANT OF INFORMAL IMMUNITY AS TO SPECIFIC EVENTS WHICH LED UP TO THE INDICTMENT, INVOKED HIS FIFTH AMENDMENT RIGHTS AND REFUSED TO ANSWER QUESTIONS WITH RESPECT TO THE DETAILS OF THOSE EVENTS?

LIST OF PARTIES

The parties in the proceeding in the United States Court of Appeals for the Sixth Circuit were as follows:

1. Robert H. Gullett, Defendant-Appellant.
2. Marvin Fox, Defendant-Appellant.
3. United States of America, Plaintiff-Appellee.

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The Petitioner, Robert H. Gullett, by his attorney, Ivan E. Barris, prays that a Writ of Certiorari issue to review the Judgment heretofore entered against him by the United States Court of Appeals for the Sixth Circuit on July 28, 1983.

OPINIONS BELOW

The Judgment and Commitment Order of the United States District Court for the Eastern District of Michigan, Southern Division, is unreported, but is set forth in Appendix B herein.

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at __ F.2d __ (6th Cir. 1983) and is set forth in Appendix C herein.

The Order of August 15, 1983 Staying Mandate is set forth in Appendix D herein.

JURISDICTION

The Opinion and Decision of the United States Court of Appeals for the Sixth Circuit were entered on July 28, 1983. The time for filing the Petition for Writ of Certiorari continues to September 26, 1983. The jurisdiction of the Court is invoked under Title 28, U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process or law; nor shall private property be taken for public use without just compensation.

SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall havae been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of counsel for his defence.

FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

THE TEXT OF THE STATUTES INVOLVED ARE SET FORTH IN APPENDIX A HEREIN.

STATEMENT OF THE CASE

Defendant-Appellant, Robert H. Gullett, and Marvin Fox were indicted on December 9, 1980. At the time of the indictment, Mr. Gullett and Mr. Fox were partners, along with Wayne Boyer, in the accounting firm of

Gullet, Fox & Boyer. (T.T. pp 451-452). The Indictment alleged in Count 1 that Mr. Gullett and Mr. Fox, while associated with or employed by the enterprise of Gullett, Fox & Boyer, an entity which affected interstate commerce, conspired to operate the enterprise through a pattern of racketeering, contrary to 18 U.S.C. § 1962(c).

Counts 2-7, 10-17, 20, and 21, alleged that Mr. Gullett and Mr. Fox caused certain securities, having a value in excess of $5,000.00, to be transported in foreign commerce knowing the same to have been stolen, converted or taken by fraud, contrary to 18 U.S.C. § 2314 and 18 U.S.C. § 2.

The Indictment alleged, in Counts 8, 18, 19 and 22, that Mr. Gullett and Mr. Fox knowingly caused Robert G. Davis to travel in foreign commerce with the intent to promote, manage, establish and carry on and to facilitate the promotion, management, establishment and carrying on of an unlawful activity, the payment of commercial bribes in violation of MCL 750.125, and that they thereafter performed acts promoting, managing, establishing and carrying on and facilitating the promotion, management, establishment and carrying on of said unlawful activity, contrary to 18 U.S.C. § 1952, and 18 U.S.C. § 2.

In Count 9, Mr. Gullett was charged with obstruction of justice, contrary to 18 U.S.C. § 1503, by endeavoring to influence, obstruct and impede the administration of justice by counseling, advising and suggesting to Joseph E. Leich that he give false testimony before a Federal Grand Jury and offering a sum of money to Mr. Leich for such false testimony.

Count 23 alleged that Mr. Gullett, Mr. Fox and Mr. Leich conspired to defraud the United States by obstructing and hindering the Internal Revenue Service

in its lawful duty to ascertain and collect information used in assessing and collecting taxes, and in the collection of taxes and by making false, fictitious and fraudulent statements in connection with the preparation and filing of documents submitted and filed with the Internal Revenue Service, contrary to 18 U.S.C. § 371.

Counts 24 and 25 alleged that Mr. Gullett attempted to evade and defeat a large portion of the income taxes due and owing by a corporation, Industrocraft, Inc., to the United States government for the fiscal years ending March 31, 1978 and March 31, 1979 by causing to be prepared a false and fraudulent U.S. Corporation Income Tax Return, contrary to 26 U.S.C. § 7201.

In Counts 26 and 27, Mr. Gullett was alleged to have attempted to defeat and evade a large part of income tax due and owing by Joseph Leich and his wife for the calendar years 1977 and 1978, respectively, by causing to be prepared and by signing and causing to be signed a false and fraudulent U.S. Individual Income Tax Return on behalf of Joseph Leich and his wife.

Mr. Wayne Boyer, the third member of the accounting firm of Gullet, Fox & Boyer, was not charged in this Indictment. He was a witness for the Government at Mr. Gullett's trial under a plea agreement whereby he pled guilty to a conspiracy to violate the United States Customs Law and agreed to testify at Mr. Gullett's trial. (T.T. p 493).

Mr. Boyer's testimony indicated that he met Robert G. Davis at a luncheon. Mr. Davis mentioned to him that he was an insurance agent in Canada and that he could cash checks in Canada and then bring the cash back to the United States in U.S. funds. (T.T. p 453). Mr. Boyer discussed this with Mr. Gullett and Mr. Fox and recommended that they make use of Mr. Davis' services.

(T.T. p 454). A fee of Five (5%) Percent of the amount of each check for Mr. Davis and a similar Five (5%) Percent for Gullett, Fox and Boyer was discussed. (T.T. p 454).

Mr. Boyer testified that during 1977 and 1978 he received checks drawn on the account of Industrocraft, Inc. made payable to Gullett, Fox & Boyer, R. G. Davis or T. A. Gellen. He gave these checks to Mr. Davis to cash in Canada. Mr. Davis cashed them, kept a Five (5%) Percent fee for his services and returned the remainder of the cash to Mr. Boyer. Mr. Boyer took out a Five (5%) Percent fee for the accounting firm and gave the rest to Mr. Gullett or left it at the front desk for Joseph Leich to pick up. The fee for the accounting firm was split between Mr. Gullett, Mr. Fox and Mr. Boyer, usually in percentages computed pursuant to their partnership agreement. (T.T. pp 454-467).

Mr. Boyer also testified that he used Mr. Davis and this system to cash checks, which were drawn on the accounts of Delta Tube Fabricating Company, Guardian Life Insurance Company, Commercial Contracting Corporation, Brenchal Contractors, Inc., and American International Contracting, Inc. (T.T. pp 467-487).

Mr. Joseph Leich, chief operating officer of Industrocraft, Inc. testified that Mr. Gullett handled the corporate books for Industrocraft, Inc. (T.T. p 320). Mr. Leich approached Mr. Gullett and asked if there was a way he could generate some cash "to take care of business situations." (T.T. p 325). On cross-examination he testified that he passed the money on to people he did business with, to bribe them, although he refused to identify such persons. (T.T. pp 377-378).

Mr. Gullett suggested that Mr. Leich write a check to Gullett, Fox & Boyer and mark it as commissions. Gullett, Fox & Boyer would put the check through their

books, pay the tax on it, give Fifty (50%) Percent back in cash, and Industrocraft, Inc. would have an expense item. (T.T. p 326). Using this procedure, Mr. Leich wrote several checks on the Industrocraft account and provided them to Gullett, Fox & Boyer. Mr. Leich received Fifty (50%) Percent of the face value of these checks. (T.T. pp 326-339, 345-346, 350-352).

Mr. Leich also testified that entries in the books and records reflecting these checks were false and that the tax returns prepared by Mr. Gullett and filed for Industrocraft, Inc. for the fiscal years ending March 31, 1978 and March 31, 1979 were not true and accurate (T.T. pp 339-341).

Mr. Leich testified that Robert Gullett prepared his personal joint income tax returns for the calendar years 1977 and 1978 and that they were not true and accurate in all respects. (T.T. pp 341-343).

After the Government's investigation came to light, Mr. Gullett advised Mr. Leich to get an attorney. He thereafter met with Mr. Leich and his corporate attorney. (T.T. p 354). Mr. Leich's testimony indicated that Mr. Gullett told him he (Leich) should have gotten back 90%-95% like everyone else, that Mr. Leich had $50,000 coming and Mr. Gullett would "make that good with a personal check." (T.T. p 356).

Mr. Leich's attorney contacted Government agents in Detroit and told them about this conversation. (T.T. p 357). Mr. Leich agreed to meet with Mr. Gullett on April 16, 1980 and tape the meeting. The tape made of this meeting was played at trial. Mr. Leich summarized the discussion that took place at the meeting during his testimony at trial and indicated that Mr. Gullett said he would pay him $30,000. (T.T. pp 360-362).

During cross-examination of Mr. Leich, the following colloquy occurred:

"Q. (by Defense Counsel): "Now, Mr. Leich, I want to show you a few checks which you have identified. The first in the amount of $977.86. Was that the first check, one-half of the proceeds of which you claim you received back?

A. Yes; that was the first check.

Q. Now, what did you do with your one-half that you claim you got back?

A. I passed it on.

Q. To whom?

A. To various people.

Q. People with names, I assume?

A. I passed it on to various people who do business with us, to bribe them.

Q. Start naming those people?"
(T.T. pp 377-378).

At this point, Government counsel objected on grounds of relevancy. (T.T. pp 378-379). Defense counsel urged an answer to the question concerning the identity of the persons the witness said he bribed for the purpose of testing the credibility of the witness with respect to the specific events to which he had testified. (T.T. p 379). After a side-bar conference, the trial court allowed defense counsel to put the question to the witness out of the presence of the jury to see what his response would be. In response to defense inquiry as to the identity of the persons claimed to have been bribed, the witness asked the Court if he could confer with his counsel, who

thereupon requested the Court to "have the file closed as to the answer," and indicated to the Court that there was a Fifth Amendment problem. (T.T. pp 386-387).

Defense counsel responded that the question was proper and that the witness had waived his Fifth Amendment privilege when he indicated that he had used the money for commercial bribes. (T.T. pp 387-388).

The trial court ruled that defense counsel properly could ask the witness for the identity of the persons he said he bribed, even though the result would be that the witness could invoke his Fifth Amendment privilege in the jury's presence. The Court, however, declined to require that the witness answer the question. (T.T. pp 372-376, 378).

Following this ruling, after preserving the issues, defense counsel asked the identity of the individuals that Mr. Leich had testified he bribed. Mr. Leich invoked his Fifth Amendment privilege and declined to answer. (T.T. pp 378-382).

Defense counsel thereafter requested that the trial court order the Government to grant its witness immunity, or strike Mr. Leich's testimony. The trial court declined, stating that there was no knowing waiver of Mr. Leich's Fifth Amendment privilege, that it could not order the Government to immunize the witness, and that a collateral issue was involved. (T.T. pp 617-633). These issues were raised in Mr. Gullett's Motion for Judgment of Acquittal Notwithstanding Verdict and/or for a New Trial, which was denied.

Other evidence presented at trial is not material to the consideration of the question presented.

Mr. Gullett was jury convicted on all 27 counts. Motions for Acquittal or New Trial were denied. Mr. Gullett was sentenced to a term of seven (7) years imprisonment on Counts 1-7, 10-17, 20 and 21, and to a term of five (5) years imprisonment on Counts 8, 9, 18, 19, 22 and 23-27, such terms to run concurrently. He also was fined Twenty-Five Thousand ($25,000.00) Dollars on Count 1.

The convictions were affirmed by the United States Court of Appeals for the Sixth Circuit on July 28, 1983.

A Motion to Stay the Mandate was granted on August 15, 1983.

REASONS FOR ALLOWANCE OF THE WRIT

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW BY RULING THAT THE DISTRICT COURT HAD NOT ABRIDGED DEFENDANT-APPELLANT'S SIXTH AMENDMENT CONFRONTATION RIGHTS BY IMPERMISSIBLY LIMITING THE CROSS-EXAMINATION OF ONE OF THE GOVERNMENT'S PRINCIPAL WITNESSES WHO, AFTER TESTIFYING UNDER A GRANT OF INFORMAL IMMUNITY AS TO SPECIFIC EVENTS WHICH LED UP TO THE INDICTMENT, INVOKED HIS FIFTH AMENDMENT RIGHTS AND REFUSED TO ANSWER QUESTIONS WITH RESPECT TO THE DETAILS OF THOSE EVENTS.

This case involves important questions concerning a defendant's Sixth Amendment rights to confront and cross-examine a witness against him where the Government has selectively "immunized" portions of its own witness' testimony and the witness invokes his Fifth Amendment privilege and refuses to answer questions on cross-examination with respect to specific events which led to the indictment.

Joseph Leich, one of the Government's principal witnesses, testified under an agreement with the Government whereby he pled guilty to one count of conspiracy to launder money for Gullett, Fox & Boyer, and two counts of income tax evasion, and agreed to testify. It was part of the plea agreement that Mr. Leich might be compelled to testify further for the Government, but only in a grand jury. (T.T. pp 369-376). The Government, in return, recommended a two-year limit on sentencing. (T.T. p 371). Mr. Leich's testimony was directly pertinent to 16 of the 27 counts of which the Petitioner, Mr. Gullett, was convicted.

On direct examination, Mr. Leich testified that he embarked upon the charged laundering scheme to generate "cash to take care of some customers." (T.T. p 325). During cross-examination of Mr. Leich, the following colloquy occurred:

"Q. (by Defense Counsel): "Now, Mr. Leich, I want to show you a few checks which you have identified. The first in the amount of $977.86. Was that the first check, one-half of the proceeds of which you claim you received back?

A. Yes; that was the first check.

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Q. Start naming those people?"
(T.T. pp 377-378).

At this point, Government counsel objected on grounds of relevancy. (T.T. pp 378-379). Defense counsel urged an answer to the question concerning the identity of the persons the witness said he bribed for the purpose of testing the credibility of the witness with respect to specific events to which the witness had testified previously. (T.T. p 379). After a lengthy side-bar conference, the trial court allowed defense counsel to put the question to the witness out of the presence of the jury to see what his response would be. In response to defense inquiry as to the identity of the persons he stated he had bribed, the witness asked the Court if he could confer with his counsel, who thereupon requested the Court to "have the file closed as to the answer," and indicated to the Court that there was a Fifth Amendment problem. (T.T. pp 386-387).

Defense counsel responded that the question was proper and that the witness had waived his Fifth Amendment privilege when he indicated that he had used the money for commercial bribes. (T.T. pp 387-388).

The trial court ruled that defense counsel properly could ask the witness for the identity of the persons he said he bribed, even though the result would be that the witness could invoke his Fifth Amendment privilege in the jury's presence. The Court, however, declined to require that the witness answer the question. (T.T. pp 372-376, 378).

Following this ruling, but preserving the issues, defense counsel asked the identity of the individuals that Mr. Leich had testified he bribed. Mr. Leich invoked his Fifth Amendment privilege and declined to answer. (T.T. pp 378-382).

Defense counsel, at a subsequent time, requested that the trial court order the Government to grant its witness immunity, or strike Mr. Leich's testimony. The trial court declined, stating that there was no knowing waiver of Mr. Leich's Fifth Amendment privilege, that it could not order the Government to immunize the witness, and that a collateral issue was involved. (T.T. pp 617-633).

The United States Court of Appeals for the Sixth Circuit ruled that the witness had properly invoked the Fifth Amendment and that under *Alford* v. *United States*, 282 U.S. 687, 694 (1931), the defendant's right to discredit a prosecution witness on cross-examination cannot overcome the witness' privilege against self-incrimination. (Slip Opinion pp 7-8).

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *." This confrontation clause guarantees a defendant the right to cross-examine the witnesses against him. *Davis* v. *Alaska*, 415 U.S. 308, 315; 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

In the instant case, the witness did not properly invoke his Fifth Amendment privilege against self-incrimination. When defense counsel asked the witness what he did with the very money he claimed he got back from the Defendants, the witness responded: "I passed it on to various people who do business with us, to bribe them." By testifying that he bribed people with whom he did business, the witness waived his privilege with respect to that bribery, *to-wit*: the identity of the persons he allegedly bribed.

In *Rogers* v. *United States*, 340 U.S. 367, 373; 71 S.Ct. 438, 95 L.Ed. 344 (1950), the United States Supreme Court stated the rule as follows:

> "Where criminating facts have been voluntarily revealed, the privilege cannot be invoked to avoid disclosure of the details."

The trial court in the instant case found that disclosure of the fact of the bribery did not waive the witness' privilege with respect to the identities of the persons allegedly bribed. The Court reasoned that although the witness had entered into an agreement regarding federal prosecution, revelation of the identities of the persons bribed may incriminate the witness with respect to state prosecutions. (T.T. p 633). The Sixth Circuit Court of Appeals agreed with the trial court and stated:

> "Although Leich had been granted informal immunity by the federal prosecutors, this immunity did not extend to testimony regarding his acts of bribery. Thus, his testimony could have been used by the state of Michigan in a prosecution for commercial bribery under M.C.L.A. 750.125. *See Kastigar* v. *United States*, 406 U.S. 441, 456-459 (1972); *Malloy* v. *Hogan*, 378 U.S. 1, 10-11 (1964). Since disclosure of those who received bribes would surely have enhanced any state prosecution of Leich by providing the state with the names of potential prosecution witnesses, we hold that the district court properly upheld Leich's claim of privilege. *United States* v. *LaRiche*, 549 F.2d 1088 (6th Cir. 1977); *United States* v. *Seifert*, 648 F.2d 557, 561 (9th Cir. 1980)."

The Sixth Circuit Court of Appeals' ruling is erroneous for two reasons. First, it is inconsistent with this Court's opinion in *Rogers* v. *United States, supra*.

The Courts' analysis with respect to waiver focuses on the agreement under which the witness testified rather than on what was revealed by his testimony in determining whether the privilege existed. The proper determination was whether revelation of the identity of the persons allegedly bribed further would have incriminated the witness *after* he had revealed that he had bribed people with whom he did business. *See, Rogers* v. *United States, supra,* 340 U.S. at 374-375.

This Honorable Court set forth the proper analysis in *Rogers*:

> "The case of the *ordinary witness* can hardly present any doubt. He may waive his privilege; this is conceded. He waives it by exercising his option of answering; this is conceded. Thus the only inquiry can be whether by *answering as to fact X, he waived it for fact Y.* If the two are related facts, parts of a whole fact forming a single relevant topic, then his waiver as to a part is a waiver as to the remaining parts; because the privilege exists for the sake of the criminating fact as a whole." (Emphasis in original.) *Id.* n. 16.

The witness testified that he used this money to bribe people with whom he did business, thereby revealing an incriminating fact. Revelation of the identity of the persons bribed would not have further incriminated the witness — the crime was already admitted — state or federal. Thus, having revealed the incriminating fact, the witness could not invoke the privilege to avoid disclosure of details of the alleged bribery which could be tested by cross-examination.

The Courts below erred when they found that the witness had not waived his right against self-incrimination.

Second, the Courts' ruling is inconsistent with this Court's decision in *Murphy* v. *Waterfront Commission*, 378 U.S. 61, 79 (1964). Mr. Leich was not formally immunized by the Government. However, he testified under an agreement that he would not be prosecuted for any further offenses arising out of those facts that were within the knowledge of the Government, concerning cases in which he would testify.

Further, it was part of the plea agreement that Mr. Leich might be compelled to give the very information sought on cross-examination, the names of bribed persons, *but only in a grand jury!* (T.T. pp 369-376). Thus, the witness had immunity with respect to the information the Petitioner wished to cross-examine him on, but the Government did not want this information revealed at trial. The Courts below erred when they found that the State of Michigan could have used the witness' testimony in a prosecution for commercial bribery under M.C.L.A. 750.125. The immunity protected the witness from State and Federal prosecution. *See, Murphy* v. *Waterfront Commission*, 378 U.S. 61, 79 (1964).

It is crucial that this scenario be seen for what it is — the Government effectively *granted* "immunity" to its own witness *but* only to those areas *it* wanted brought out! This is the most egregious situation imaginable.

This is not a case where a defendant seeks to have his or her witness immunized. This is not even a case where a defendant seeks to have a non-immunized Government witness immunized. This is a case where the Defendant simply seeks to avoid having a Government witness "immunized" selectively, when the witness is allowed to answer the Government's questions, but precluded from answering Defendant's questions.

Defense counsel specifically requested that the trial court order the Government to grant the witness immunity to protect the Defendant's Sixth Amendment right to confrontation. (T.T. pp 621-622).

What the Government has done here is to fashion a plea agreement to have the effect of selectively precluding defense inquiry into areas other than those *it* wishes to have disclosed at trial.

Seen in this context, the relief sought was not the fashioning of some "new" right to "defense immunity," but rather was an effort to enforce the unquestioned right to Due Process of Law by this particular means. Even the oft-cited opinion in *Earl* v. *United States*, 361 F.2d 531 (D.C. Cir.), *reh. denied*, 364 F.2d 666 (D.C. Cir. 1966) (en banc) (per curiam), an opinion by then-Judge Burger, does not disagree. Although Judge Burger, for the Court, held that the Courts did not have power to grant defense witnesses immunity, he recognized that due process demands presented a different problem:

> "We might have quite different, and more difficult, problems had the Government in this case secured testimony from one eyewitness by granting him immunity while declining to seek an immunity grant for Scott to free him from possible incrimination to testify for Earl. That situation would vividly dramatize an argument on behalf of Earl that the statute *as applied* denied him due process. Arguments could be advanced that in the particular case the Government could not use the immunity statute for its advantage unless Congress made the same mechanism available to the accused." 361 F.2d at 534 n. 1. *See also, United States* v. *Alessio*, 528 F.2d 1079, 1082 (9th Cir. 1976).

Of course, the situation presented in the instant case is even worse — the Government did not immunize one witness and refuse to immunize *another* — it "half-immunized" its own witness.

Assuming *arguendo* there was no waiver, the ultimate question is whether the Court had authority, and was required, to direct that this Government witness be immunized, or, failing that, to order the testimony stricken, to ensure Defendant a fair trial.

The Sixth Circuit Court of Appeals has held that the Courts have no statutory authority to compel the United States Attorney to immunize *defense* witnesses. *United States* v. *Lenz*, 616 F.2d 960, 962 (6th Cir. 1980). However, *Lenz* dealt with a defendant's right under the compulsory-process clause to have *defense* witnesses immunized. The instant case involves a criminal defendant's right of confrontation under the Sixth Amendment to require immunization of a *prosecution* witness who refuses to answer questions on cross-examination where the witness already had been promised "non"-prosecution as to areas inquired into on direct examination.

The United States Court of Appeals for the Third Circuit has recognized the inherent authority of a court to confer a judicially fashioned immunity upon a *defense* witness whose testimony is essential to an effective defense. *Government of the Virgin Islands* v. *Smith*, 615 F.2d 964 (3rd Cir. 1980). *See also*, *United States* v. *Herman*, 589 F.2d 1191 (3rd Cir. 1978).

In the instant case, Mr. Gullett was denied an opportunity to confront and cross-examine the Government witness *with respect to the events that led up to this very indictment* because of the witness' invocation

of the Fifth Amendment privilege. If the witness properly invoked the Fifth Amendment, Mr. Gullett's constitutional rights were in direct conflict with those of the witness. The trial court should have ordered the Government to immunize its witness with regard to answers to questions on cross-examination just as it had "immunized" him regarding direct examination, a remedy which would have vindicated both persons' Constitutional rights.

The result of the Government's declination to immunize Mr. Leich was a "distorting [of] the factfinding process," and "apparently intimately involved" with the Government's trial strategy. *Virgin Islands* v. *Smith, supra,* at 969. *United States* v. *Herman,* 589 F.2d 1191, 1204 (3rd Cir. 1978).

Because the trial court did not compel the witness to answer the question on cross-examination, or direct the granting of immunity, defense counsel moved that the Court strike all of Mr. Leich's testimony. The Court declined to do so because it determined that the inquiry concerned a collateral matter. (T.T. p 633). The Sixth Circuit Court of Appeals found no abuse of discretion in the District Court's refusal to strike all or part of Mr. Leich's direct testimony. (Slip Opinion p 10).

The Government argued that the identity of the persons bribed was collateral because there is no requirement to prove that a person was actually bribed to convict the Petitioner under the Travel Act. Whether or not the Government had to prove the bribery occurred in order to convict Mr. Gullett does not conclude the inquiry. These alleged bribes were intimately related to the specific charges made against Mr. Gullett in this trial and to the credibility of Mr. Leich. Cross-examination

with respect to the facts of these alleged bribes was relevant to testing the credibility of the Government witness with respect to the details of the particular criminal activity alleged in this case.

Accordingly, this is not an instance, where defense counsel was inquiring into extraneous criminal matters for the purpose of attacking the general credibility of the witness. Defense counsel was deprived of the opportunity to test the truthfulness of the witness with respect to specific testimony relating to specific events of the crimes charged — testimony obtained by Government-granted immunity! The trial court erred by not striking all of the testimony of Mr. Leich when it declined to direct Mr. Leich to answer the questions.

If this practice is allowed, *i.e.* the Government limiting its non-prosecution agreement with its own witness to specific areas of inquiry, even within the particular subject involved in the trial, the trial becomes a farce, and the Fifth and Sixth Amendment become a Government tool, rather than a protection against Government abuse. The Government is thereupon able to fashion testimony to the letter simply by the careful drafting of its non-prosecution or immunity agreement, safe in the knowledge that the Courts will not "intrude" on the executive branch's discretion over immunity decisions.

The abuses of such a system are limitless. The Government by its fashioning of the terms of the non-prosecution agreement or immunity order, could cause testimony about the bribing of "A," but preclude it about "B." Testimony about admitting one murder could be obtained, but the jury prevented from learning that the witness is a professional assassin, having killed

five others about which the Government did not grant immunity. The trial ceases to be a trial, and becomes a script written by the drafter of the non-prosecution agreement.

A defendant's right to Due Process, a fundamentally fair trial, coupled with the Sixth Amendment right to confront his accusers by cross-examination, is violated, blatantly, by this process.

For all the foregoing reasons, this Petition should be granted.

CONCLUSION

This Petition for Writ of Certiorari should be granted.

Respectfully submitted,

By: /s/ IVAN E. BARRIS (P10484)
Attorney for Petitioner,
Robert H. Gullett

1930 Buhl Building
Detroit, Michigan 48226
(313) 964-5070

Dated: September 8, 1983.

APPENDICES

APPENDIX A

TEXT OF STATUTES INVOLVED

18 U.S.C. § 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 1952. The Travel Act — Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to —

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

18 U.S.C. § 2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof —

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country.

APPENDIX B

JUDGMENT AND COMMITMENT ORDER

(United States District Court
Eastern District of Michigan)

(Filed August 13, 1981)

(United States of America vs. Robert H. Gullett, Defendant — Docket No. 80-80763-01)

Counsel: In the presence of the attorney for the government the defendant appeared in person on this date: 8/12/1981

☒ *With Counsel:* Ivan E. Barris

Finding & Judgment: There being a verdict of:

☒ Guilty, of the charges contained in Counts 1-27.

Defendant has been convicted as charged of the offense(s) of: conspiracy of racketeering in violation of 18 USC 1962(d), (Count 1); aiding and abetting the transportation of stolen securities in violation of 18 USC 2314 and 2, (Counts 2-7, 10-17, 20, 21); interstate travel in aid of racketeering in violation of 18 USC 1952 and 2, (Counts 8, 18, 19, 22); obstruction of justice in violation of 18 USC 1503, (Count 9); conspiracy to defraud the United States in violation of 18 USC 371, (Count 23); and tax evasion in violation of 26 USC 7201, (Counts 24-27).

Sentence or Probation Order: The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of seven (7) years on Count 1; seven (7) years on Counts 2-7 inclusive, 10-17 inclusive, 20 and 21; said sentences to be concurrent with each other and with the sentence on Count 1; five (5) years on Counts 8, 9, 18, 19, 22, and 23-27 inclusive, said sentences to be concurrent with each other and with the sentence on Count 1. It is further ordered that defendant pay a committed fine of twenty-five thousand dollars ($25,000.00) on Count 1.

Special Conditions of Probation: Defendant is continued on his present bond pending his appeal of this sentence.

Additional Conditions of Probation: In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

Commitment Recommendation: The court orders commitment to the custody of the Attorney General and recommends, _____

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Signed by: /s/ John Feikens
Chief U.S. District Judge

Date: August 12, 1981

APPENDIX C

OPINION

(United States Court of Appeals
for the Sixth Circuit)
(Decided and Filed July 28, 1983)

(United States of America, Plaintiff-Appellee, vs. Robert H. Gullett (81-1536) *and* Marvin Fox (81-1537), Defendants-Appellants — On Appeal from the United States District Court for the Eastern District of Michigan)

Before: Merritt and Contie, Circuit Judges, and Moynahan, District Judge.*

Contie, Circuit Judge.

Robert Gullett and Marvin Fox appeal their convictions on multiple counts of interstate transportation of stolen securities, 18 U.S.C. § 2314, four Travel Act offenses, 18 U.S.C. § 1952, conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO), 18 U.S.C. § 1962(d), and conspiracy to defraud the United States, 18 U.S.C. § 371. Defendant Gullett was also convicted on one count of obstruction of justice, 18 U.S.C. § 1503, and four counts of tax evasion, 26 U.S.C. § 7201. For the reasons stated below, we affirm their convictions.

I.

The defendants were partners in Gullett, Fox and Boyer, an accounting firm located in Southfield, Michigan. Prior to July, 1977, the firm had occasionally allowed clients to write checks to the firm for non-existent accounting services, and then cashed those

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* The Honorable Bernard T. Moynahan, Jr., Chief Judge, United States District Court for the Eastern District of Kentucky, sitting by designation.

checks for the clients. In July, 1977, Wayne Boyer, the most junior of the three partners, met Robert Davis, a Canadian insurance agent. Davis told Boyer that he had a line of credit at the Metropolitan Trust Company in Windsor, Ontario, and that he could cash checks there and bring the money back to this country in United States currency. After this meeting, Boyer suggested to the defendants that the firm use Davis to cash their clients' checks for them in Canada for a fee of five percent of the face amount. The defendants agreed to the idea, and Boyer became an intermediary in the check-cashing plan. This involved turning the checks over to Davis, and, upon Davis' return, sending the proceeds to their clients.

The Industrocraft Checks

In September, 1977, Joseph Leich, the chief operating officer of Industrocraft, Inc., asked defendant Gullett, his corporate and personal accountant, if there was any way Industrocraft could generate cash "to take care of some customers." Gullett suggested that Leich make out a check from Industrocraft to the accounting firm for "commissions." According to Gullett's plan, the defendants would pay the income tax on the sum, Industrocraft would get a business tax deduction, and Leich would receive 50% of the check's face amount. Leich agreed, and made out a check to Gullett, Fox and Boyer for $8,578.86. This sum was falsely entered in Industrocraft's books as a "legal and accounting" expense. Gullett gave Boyer the check to give to Davis. Davis cashed the check in Windsor, Ontario, and gave Boyer the proceeds minus his five percent commission. The defendants took their share of the proceeds, and Gullett gave the balance to Leich. This procedure was repeated on at least nine other occasions over a two and one-half year period, with Leich naming the defendants'

accounting firm, Davis, and even fictitious persons as payees. When Robert Leich, Industrocraft's majority shareholder and Joseph Leich's brother, asked his brother and Gullett who Davis was, they told him that Davis was a manufacturer's representative from Ohio. The record indicates that all the checks were falsely entered in Industrocraft's records as commission payments to the above-mentioned payees.

The Delta Tube Check

In 1978, Genova, Inc., a firm that manufactures plumbing supplies, closed one of its plants. As a result of the closing, it had an electrical transformer to dispose of. The record indicates that several of Genova's oficers discussed the possibility of selling the transformer and keeping the proceeds. One of the officers asked Boyer if his accounting firm could supply a phony invoice. Boyer agreed to do so, and sent an invoice from a fictitious entity called Crown Electric Company.

In May, 1978, Delta Tube & Fabricating Corporation agreed to buy the transformer. When Delta arranged to pick up the transformer, it was told that Crown Electric had already bought the transformer, and thus to make its check payable to Crown Electric. The Genova officers sent the check to the defendants' accounting firm, and they gave it to Davis to cash in Canada. After Davis and the defendants took their commission, the remainder of the proceeds were divided among the Genova officers.

The Guardian Life Checks

The Guardian Life Insurance Company provided insurance packages for various business enterprises, which included the payment of rebates or dividends. In July and August, 1979, Bruce Eavenson, a district group manager employed by Guardian, brought several

dividend checks to Vincent Mancuso, an independent insurance agent. Mancuso called defendant Fox, his accountant, and asked if Fox knew of a way to cash checks that belonged to other people. Fox told him that Boyer could cash the checks for a fee of 25%. Mancuso returned the checks to Eavenson and referred him to the defendants' accounting firm.

Eavenson called Boyer and made the arrangements. Boyer initially received three checks, totalling about $23,000, which were taken to Canada by Davis and cashed in August, 1979. Several weeks later, Boyer gave Eavenson the proceeds, minus the agreed commission. At Fox's suggestion, Fox and Boyer did not initially inform Gullett of the transaction. Eavenson eventually gave Boyer four more checks which were also cashed in Canada. Gullett received a portion of the commission from these checks and later received his share from the first group. The endorsements on all the checks were forged, and none of the proper payees received any of their earned dividends.

The Commercial Contracting Corporation and Brencal Contractors, Inc. Checks

Commercial Contracting Corporation installed major industrial machinery on an international scale. In July, 1977, Commercial bid on a construction project planned for a Chrysler assembly plant in Illinois. A competitior of Commercial's, Fischbach and Nathin, Inc., also bid on the project. Shortly thereafter, Patrick Conlon, an executive at Fischbach and Nathin, called an officer of Commercial and said that Fischbach and Nathin had outbid Commerical for the job, but would use its influence to see that Commercial was awarded the contract in exchange for $100,000. After consulting with the president of Commercial Contracting, the officer agreed to pay.

Conlon then sought the assistance of Raymond Vecellio, the chief operating officer of Vecellio Electric Company. Conlon asked Vecellio if the latter could cash checks through Vecellio's company. Since the defendants' firm handled Vecellio's accounting work, Vecellio consulted them about the proposal. Boyer discussed the proposal with Fox and Gullett, and later agreed that the firm would help cash checks for Vecellio. Vecellio in turn agreed to help Conlon in order to receive further contracts from Fischbach and Nathin.

According to the plan, Conlon would notify Vecellio whenever a payoff from Commercial was arranged. Vecellio would prepare a false invoice for Commercial and Commercial would then write a check. The record indicates that the president of Commercial was deceived into signing the checks by his son and two corporate officers, who had initialed several of the false invoices for payment. Vecellio would deliver the check to Boyer, who would give it to Davis to cash in Canada. The proceeds of the check, minus the shares taken by the participants, would then be delivered to Conlon. Vecellio prepared five such invoices, and Commercial disbursed almost $111,000 for Vecellio's "services."

In June and July, 1979, Conlon solicited Vecellio's assistance in collecting $50,000 from Brencal Contractors, Inc. Vecellio again agreed and prepared two phony invoices for payment by Brencal Contractors. Vecellio gave the Brencal checks, totalling over $41,000, to Boyer, who gave them to Davis to cash in Canada. Boyer then gave the proceeds, minus the various fees, to Conlon.

Subsequently, Vecellio himself approached defendant Gullett and requested that Gullett assist him in raising some money. Gullett suggested that Vecellio write a check to Gullett's accounting firm for twice the amount

he needed. The firm would cash it and retain 50% to pay the taxes. Vecellio wrote two such checks, totalling $23,000, and received $11,500 from the defendants' firm.

The American International Checks

In January, 1979, American International Contracting, Inc., a corporation engaged in leasing and installing rigging equipment, leased equipment under a contract to Fishbach and Nathin. In November, 1979, Conlon approached Frank Vallecorsa, the president of American International, and requested that American International help him to procure funds to bribe certain individuals at Ford Motor Company. Vallecorsa agreed to submit a backdated false invoice to Fischback and Nathin for the leasing of a thirty-ton forklift. As a result of Vallecorsa's invoice, Fishbach and Nathin paid American $40,000 for the services of a forklift which, the record indicates, never even existed. Vallecorsa then wrote a check payable to Conlon for the $40,000. Conlon, however, refused to accept the payment in his own name, and instead prepared another phony invoice from Johnson & Company, a fictitious entity. Vallecorsa completed the blank invoice and billed his company for $39,880. He then wrote a check from American International to Johnson & Company for $39,880. Conlon delivered the check to Davis, who cashed it in Canada.

In December, 1979, Vallecorsa told Conlon that American International was bidding for a contract to install equipment for a construction job at a Chrysler plant in Indiana. Conlon offered to see that American International received the contract in exchange for $15,000, plus an additional $2,500 to bribe a competitor. Vallecorsa agreed, and in January, 1980, wrote another check to Johnson & Company for $17,500. Boyer delivered the check to Davis, but both were arrested before the proceeds could be distributed.

Boyer was arrested in Janurary 1980. Several months later, Gullett notified Joseph Leich that the authorities were investigating them. By that time, grand jury subpoenas had been served on both men. They later met in the presence of Leich's attorney to discuss Leich's upcoming grand jury appearance. Gullett suggested that Leich testify that he received 90% or 95% of the proceeds of each Industrocraft check, instead of the 50% that he actually received. Gullett repeated this request at a subsequent meeting. By this time, however, Leich had met with government agents and had agreed to tape this second meeting. The tape recording was admitted at trial against both Gullett and Fox. The defendants now bring this appeal.

II.

The defendants allege that the district court abridged their sixth amendment confrontation rights by impermissibly limiting the cross-examination of Joseph Leich, the chief operating officer of Industrocraft. On direct examination, Leich testified that he embarked upon the laundered money scheme to generate "cash to take care of some customers." He also testified that he received one-half of the face amount of each check. On cross-examination, Leich was asked what he did with his share of the money. Leich replied "I passed it on to various people who do business with us, to bribe them." When the defense asked Leich for the identities of the individuals who received bribes, the government objected on relevancy grounds, and Leich subsequently asserted his fifth amendment privilege against self-incrimination. The defendants contend that Leich waived his fifth amendment privilege to withhold the names of those bribed once he admitted that he had in fact used his share of the money to bribe business associates. We disagree.

Cross-examination is the principal means by which the credibility of a witness and the truth of his testimony are tested. *Davis* v. *Alaska*, 415 U.S. 308, 316 (1974). Nevertheless, the defendants' right to discredit a prosecution witness on cross-examination cannot overcome the witness' privilege against self-incrimination, if properly asserted. *Alford* v. *United States*, 282 U.S. 687, 694 (1931); *United States* v. *LaRiche*, 549 F. 2d 1088, 1096 (6th Cir.) *cert. denied*, 430 U.S. 987 (1977). The privilege is properly invoked if the trial court determines that, in light of all the circumstances, the answer to a particular question would subject the witness to a real danger of further incrimination. *Rogers* v. *United States*, 340 U.S. 367, 374 (1951).

Applying these principles, we hold that Leich properly invoked his fifth amendment privilege. Although Leich had been granted informal immunity by the federal prosecutors, this immunity did not extend to testimony regarding his acts of bribery. Thus, his testimony could have been used by the state of Michigan in a prosecution for commercial bribery under M.C.L.A. 750.125. *See Kastigar* v. *United States*, 406 U.S. 441, 456-59 (1972); *Malloy* v. *Hogan*, 378 U.S. 1, 10-11 (1964). Since disclosure of those who received bribes would surely have enhanced any state prosecution of Leich by providing the state with the names of potential prosecution witnesses, we hold that the district court properly upheld Leich's claim of privilege. *United States* v. *LaRiche, supra*; *United States* v. *Seifert*, 648 F.2d 557, 561 (9th Cir. 1980).

The defendants alternatively contend that if Leich properly invoked his fifth amendment privilege, the district court should have either struck Leich's direct testimony or instructed the government to give Leich formal immunity.

When a witness has properly invoked the privilege against self-incrimination, the question of whether to strike the witness' direct testimony turns on whether the defendants' inability to complete their inquiry created a "substantial danger of prejudice by depriving [them] of the ability to test the truth of the witness' direct testimony." *Fountain* v. *United States*, 384 F.2d 624, 628 (5th Cir. 1967),*cert. denied*, 390 U.S. 1005 (1968). If assertion of the privilege precludes inquiry into matters which involve elements or specific events of the crimes charged, there may be substantial danger of prejudice in not allowing the defendants to test the truth of the witness' direct testimony. In that case, all or part of the witness' direct testimony should be stricken. *United States* v. *Stephens*, 492 F.2d 1367, 1374-75 (6th Cir.), *cert. denied*, 419 U.S. 852 (1974). If however, the invocation of the privilege merely precludes inquiry into collateral matters which bear only on the general credibility of the witness, there is little danger of prejudice to the defendant, and, therefore, the witness' direct testimony need not be stricken. *Id.*

In this case, Leich never testified on direct examination that he actually bribed anyone, and thus Leich's refusal to answer the defense's question regarding the names of those bribed did not hinder the defense's ability to test the reliability of Leich's direct testimony. Moreover, the government did not have to prove that an act of commercial bribery had occurred in order to obtain a Travel Act conviction,[1] or a conviction

[1] The Travel Act, 18 U.S.C. § 1952, states:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce . . . with intent to — • • •
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

(*continued on following page*)

under 18 U.S.C. § 2314.[2] Therefore, Leich's refusal did not preclude the defense's inquiry into matters involving elements or specific events of the crimes for which the defendants were being tried.

Instead, the defense attorney stated at trial that the purpose of the question was to undermine Leich's credibility. While this court recognizes the importance of allowing the defense to engage in a full and complete cross-examination of key government witnesses such as Leich, *Davis* v. *Alaska*, 415 U.S. at 317-318, we hold that the defendant's question would only have elicited cumulative testimony concerning Leich's credibility. Leich's testimony on direct and cross-examination provided the defense with ample information to attack Leich's character and his motives for testifying for the prosecution. Specifically, Leich (1) admitted complicity in the charged offenses and the tax fraud scheme; (2) testified that he felt Gullett was responsible for his involvement in the case, and that he knew he might be facing criminal charges when he initially agreed to assist

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(*continued from preceding page*)

> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for more than five years or both.
>
> (b) As used in this section "unlawful activity" means . . . (2) extortion, bribery, or arson in violation of the laws of the state in which committed or of the United States.

The statute contains no requirement that the "unlawful activity", which in this case is the state crime of commercial bribery, actually be accomplished. *United States* v. *Goldfarb*, 643 F.2d 422, 426 (6th Cir.), *cert. denied*, 454 U.S. 827 (1981).

[2] The National Stolen Property Act, 18 U.S.C. § 2314, states:

> "Whoever transports in interstate or foreign commerce any . . . securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both . . . ."

the government by taping his conversation with Gullett; and (3) admitted that he had entered into a plea agreement with a maximum sentence of two years, and that he was seeking leniency by giving testimony in this case. Under the circumstances, we find no abuse of discretion in the district court's refusal to strike all or part of Leich's direct testimony.

The defendants also contend that the district court should have instructed the government to immunize Leich.

This circuit has previously held that courts have no power to compel the United States Attorney to immunize defense witnesses. *United States* v. *Lenz*, 616 F.2d 960, 962 (6th Cir.), *cert. denied*, 447 U.S. 929 (1980). Other circuits, however, have indicated that, under appropriate circumstances, they might find that a prosecutor's immunity decisions violate due process. *See, e.g., United States* v. *Morrison*, 535 F.2d 223, 229 (3rd Cir. 1976); *Earl* v. *United States*, 361 F.2d 531, 534 n.1 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967). We believe that the issue posed by the cited cases is not whether the legislative mandate leaving the immunization decision in the hands of the prosecution is constitutionally permissible, but whether the prosecution has exercised its discretion in a manner that violates due process. In this context, we hold that the defendants were not denied due process because of the government's refusal to immunize Leich. As noted earlier, Leich's response would have been cumulative testimony regarding his credibility, and thus collateral to the central issues of this case. *See United States* v. *Allesio*, 528 F.2d 1079, 1082 (9th Cir.), *cert. denied*, 426 U.S. 948 (1976).

III.

The defendants' second assignment of error is that there was insufficient evidence to support their convictions on 14 counts of violating the National Stolen Property Act, 18 U.S.C. § 2314.[3] The defendants were convicted under that portion of Section 2314 which prohibits the interstate transportation of any securities or money of the value of $5,000 or more which the defendant knows "to have been stolen, converted or taken by fraud." The words "stolen, converted or taken by fraud" have been construed to encompass virtually all ways by which an owner is wrongfully deprived of the use of his property. *United States* v. *Evans*, 579 F.2d 360, 361 (5th Cir. 1978); *United States* v. *Frakes*, 563 F.2d 803, 805-06 (6th Cir. 1977), *vacated and remanded on other grounds* 435 U.S. 911 (1978); *Lyda* v. *United States*, 279 F.2d 461, 464 (5th Cir. 1960).

Viewed in the light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942), we hold that the defendants' convictions are supported by sufficient evidence. The defendants contend that the evidence shows only that officers of several corporations used their broad agency powers to write checks for the purpose of generating cash to benefit the corporations. This explanation, however, ignores the parade of phony invoices and fictitious payees which were created in order to deceive uninvolved corporate officers and shareholders.

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[3] Unlike Gullett, defendant Fox was acquitted on one of these 14 counts (count 2) and therefore appeals only his convictions under the remaining 13 counts. Neither defendant contests his convictions under Section 2314 on counts 11 and 12, which involve the Guardian Life Insurance Company checks.

In the case of Industrocraft checks, the evidence shows that Joseph Leich and the defendants defrauded Robert Leich, Industrocraft's majority shareholder, by recording the checks as commission payments to defendants' accounting firm, to Davis, and to other fictitious payees. When Robert Leich became concerned and asked his brother and Gullett who Davis was, they told him Davis was a manufacturer's representative from Ohio. In reality, Davis was a member of the conspiracy. The record also indicates that Gullett concealed from Robert Leich several of the checks made out to Davis after Leich had asked to see them. The American International checks were similarly prepared by corporate officers who knew American International was paying for nonexistent work evidenced by phony invoices. The record indicates American International's principal stockholder would not have consented to these payments had he known the truth.

In the case of the Commercial Contracting checks, the president of the corporation was deceived into signing the checks by his son and two other corporate officers, who had initialed several of the fraudulent invoices sent by Vecellio. Initialing an invoice was the standard method of approving it for payment. Thus, the president was led to believe that the invoices represented legitimate obligations to Vecellio's company. Had he known the invoices were false, he would not have signed the checks. In the case of Delta Tube check, the defendants not only transported the check in foreign commerce "knowing the same to have been . . . taken by fraud," but actually supplied the Genova corporate officers with the false invoice from Crown Electric Company. This invoice allowed the Genova officers to deceive the representative from Delta Tube into thinking that Genova's generator had already been sold to Crown Electric. When Delta Tube delivered its check to Crown

Electric, the Genova officers pocketed the proceeds after giving the defendants their cut. The record therefore indicates that the defendants directly participated in the scheme to defraud the Genova corporation of the proceeds of the sale of one of its assets.

With respect to each check that was cashed in Canada the defendants participated in a scheme that required the preparation of false invoices and documents as a cover for the cashing of the check. These false statements were then used by corporate officers as a basis for corporate payments. Although corporate officers with broad agency powers authorized and participated in the scheme, the officers necessarily made false entries on the books of their corporations in order to secure the corporate payments. These false entries deliberately misrepresented the nature of the transactions to the corporation as an entity and hence to its owners, the shareholders, and its directors. In reliance on these false statements, the corporation made the payments. The defendants knew the invoices and documents were false and that the corporations would rely on them to make payments. Thus the basic elements of fraud — misrepresentation and detrimental reliance — are present.

It is true, as defendants argue, that corporate officers did not take corporate funds for their own benefit at the expense of the corporation from the proceeds of the checks in each instance. For example, the proceeds from the Industrocraft and American International checks were used to pay commercial bribes and were not used to enrich directly the corporate officers who participated

in the scheme.[4] Nevertheless, money was taken from the corporation based on false invoices and documents and false corporate entries and hence the property of others was "taken by fraud" as a result of the scheme.

IV.

The defendants also contend that three of the four Travel Act counts are multiplicitous. The three counts (counts eight, eighteen, & nineteen) use identical statutory language to accuse the defendants of causing Robert Davis to travel in foreign commerce from Southfield, Michigan to Windsor, Canada with the intent to promote the payment of unlawful bribes. Each count, however, alleges that the defendants caused Davis to travel on different, but overlapping, dates.[5] The defendants argue that the three counts lack specificity regarding the circumstances surrounding each violation, the dates of the alleged travel, and the precise nature of the underlying state offense.

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[4] The defendants also argue that the corporations were not deprived of the use or benefit of their property because almost all of the checks were used to bribe individuals who could insure that the corporations would receive lucrative contracts. Thus, the defendants reason, the checks were used to advance the interests of the corporations involved.

This argument is completely without merit. The evidence clearly shows that each corporation was fraudulently induced into paying for products or services which were never received. *United States* v. *Evans*, 579 F.2d 360, 361 (5th Cir. 1978). Moreover, it is undisputed that at least 10% of every check was retained by the defendants and their cohorts as a commission, and not for corporate purposes. Finally, we find the argument that the corporations were benefited by conduct which in fact violated federal and state law to be meritless.

[5] Count 8 charges that the defendants caused Davis to travel between September, 1977 and April, 1979. Count 18 charges that the defendants caused Davis to travel between January, 1978 and September, 1978. Count 19 charges that the defendants caused Davis to travel between June, 1978 and July, 1978.

Multiplicity is the charging of a single offense in several counts of the indictment. *United States* v. *Robinson*, 651 F.2d 1188, 1194 (6th Cir.), *cert. denied*, 454 U.S. 875 (1981). A multiplicitous indictment raises the specter of multiple punishment for a single offense, and can prejudice the jury by suggesting that more than one crime was committed. *United States* v. *Sue*, 586 F.2d 70, 71-72 (8th Cir. 1978). In the present case, the wording of the Travel Act counts unambiguously sets forth all the elements of a Section 1952 offense, and is supplemented with enough detail to apprise the defendants of each separate violation. Each count (1) identified the defendants, (2) identified the person whom the defendants cause to travel in foreign commerce, (3) listed the approximate dates in which the travel occurred, (4) the cities involved, and (5) identified both the underlying state offense which the defendants furthered as being commercial bribery, and the precise Michigan statute which prohibited such activity.

Furthermore, the indictment is structured so that each Travel Act count follows its related Section 2314 counts. Thus, count twenty-two's allegation of travel on or about November 27, 1979 corresponds to the Section 2314 violation involving an American International check in count twenty, which occurred on November 27, 1979. Count eighteen's allegation of travel between January, 1978 and September, 1978 corresponds to the five Section 2314 violations involving the Commercial Contracting checks in counts thirteen through seventeen, which occurred between January 11, 1978 and September 12, 1978. Count eight's allegation of travel between September, 1977 and April, 1979 is related to the Section 2314 violations involving the Industrocraft checks in counts two through seven, which occurred between September 13, 1977 and November 22, 1978. The variance

in the two time periods was remedied by the government's bill of particulars, which revised the travel period in count eight to September, 1977 through November, 1978. Count nineteen's charge of travel between June, 1978 and July, 1978 corresponded to overt acts thirty-seven through forty-three of count one, which involved the Brencal Contractor's checks, and occurred between June 29, 1978 and July 13, 1978. While a list of these overt acts did not immediately precede count nineteen, the bill of particulars cured any omission of detail by repeating the overt acts and by indicating that these overt acts occurred between June 29, 1978 and July 13, 1978.

In clarifying counts eight and nineteen, the bill of particulars was properly used to inform the defendant of the precise nature of the charges against him, to avoid or minimize the danger of surprise at trial, and to cure omissions of detail in order to facilitate a plea of double jeopardy in a subsequent prosecution for the same offense. *United States* v. *Birmley*, 529 F.2d 103, 108 (6th Cir. 1976). Accordingly, we hold that each Travel Act count sufficiently identifies a separate and distinct offense.

V.

The defendants object to the jury instruction that the element of knowledge in 18 U.S.C. § 2314 may be inferred from proof that the defendants "acted with a reckless disregard for the truth or with a conscious purpose to avoid learning the truth about the unlawful transaction involving the checks." The defendants maintain that this instruction permitted their conviction on proof amounting to negligence. We disagree. The instruction does not authorize a conviction based on negligent behavior, but rather prevents a criminal

defendant from escaping conviction merely by deliberately closing his eyes to the obvious risk that he is engaging in unlawful conduct. This interpretation, as well as the instruction itself, has already been upheld by this court. *See United States* v. *Seelig*, 622 F.2d 207, 213 (6th Cir.), *cert. denied*, 449 U.S. 869 (1980).

VI.

Defendant Fox contends that the district court erred in allowing the recorded conversation between Gullett and Joseph Leich to be admitted against him. At trial, the defense counsel argued that Gullett's statements were hearsay and could not be used against Fox because the meeting occurred after the conspiracy had terminated. The district court disagreed, and ruled that Gullett's statements were admissible against Fox because they were made "in furtherance of the conspiracy." *See Fed. R. Ev.* 801(d)(2)(E).

It is settled that Rule 801(d)(2)(E) of the Federal Rules of Evidence allows hearsay statements of one conspirator to be admitted against his fellow conspirators only if the statement was made in the course of, and in furtherance of, the conspiracy, and not during a subsequent period when the conspirators were engaged in nothing more than concealment of the criminal enterprise. *Krulewitch* v. *United States*, 336 U.S. 440, 443-44 (1949). In this case, the record indicates that the conspiracy had in fact terminated prior to the meeting between Leich and Gullett. Davis and Boyer had already been arrested, and the defendants were under investigation by the grand jury. Furthermore, the record indicates that the principal purpose of the meeting was to discuss ways to conceal information from the grand jury. We therefore hold that Gullett's statements could not be admitted against Fox under Rule 801(d)(2)(E).

Our finding that error was committed does not, however, end our inquiry. Although the introduction of Gullett's hearsay statements against Fox in this joint trial arguably violated Fox's sixth amendment confrontation rights, *Bruton* v. *United States*, 391 U.S. 123, 126 (1968), we hold that any error was harmless beyond a reasonable doubt. *Harrington* v. *California*, 395 U.S. 250, 254 (1969); *Chapman* v. *California*, 386 U.S. 18, 24 (1967).

The references to Fox on the tape must be taken in context in order to appreciate their prejudicial effect. In the actual conversation between Gullett and Leich, which lasted almost one hour and covered nineteen pages of transcript, there are only seven references to Fox, four of which could be construed as prejudicial. The first is when Gullett stated that he told Fox that Davis was taking 10% of each check as a service charge. The second is another statement by Gullett in which he told Fox that he refused to continue the check-cashing operation. The third is when Gullett said that he had expressed his concern to Fox that Boyer had his own attorney, and the fourth is when Leich asks if both defendants "are going to cover" for him. Since Vincent Mancuso and Wayne Boyer had already testified of Fox's active involvement in the conspiracy, we find beyond a reasonable doubt that these passing references to Fox, made during a conversation which was principally devoted to a discussion of Leich's impending grand jury appearance, were harmless. In this respect, the case at bar is clearly distinguishable from cases in which the inadmissible hearsay statements represented the only proof of an essential element of the alleged offense. *See, e.g., United States* v. *Felix-Jerez*, 667 F.2d 1297, 1304 (9th Cir. 1982); *United States* v. *Lang*, 589 F.2d 92, 100 (2nd Cir. 1978).

VII.

We also disagree with Fox's argument that he was denied effective assistance of counsel due to the joint representation of both defendants by the same attorney. Pursuant to Federal Rule of Criminal Procedure 44(c),[6] the district judge held a pre-trial hearing with both defendants and their defense counsel, Mr. Barrett, to raise the conflict of interest issue. The district judge and Mr. Barrett indicated that a conflict of interest could arise, and expressly warned the defendants of that possibility. The defendants responded that they understood the possibility of conflict, and both expressly waived their right to separate counsel.

Fox contends, however, that an actual conflict arose during the trial because of Barrett's failure to distinguish the "minimal" and "acquiescent" conduct of Fox from the dominant role played by Gullett. This argument is without merit. The record indicates that Barrett diligently represented Fox's interests at trial. He successfully persuaded the court to dismiss the obstruction of justice charge against Fox, and, contrary to Fox's assertions, reminded the jury on several occasions

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[6] Federal Rule of Criminal Procedure 44(c) states:

> Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

that the testimony of key government witnesses tended only to implicate Gullett, and not Fox. Under the circumstances, we find no actual conflict of interest in Barrett's representation of Fox and Gullett. *Cuyler* v. *Sullivan*, 446 U.S. 335, 348 (1980).

Accordingly, the judgment of the district court is Affirmed.

APPENDIX D

ORDER STAYING MANDATE

(United States Court of Appeals
for the Sixth Circuit)

(Filed August 15, 1983)

(United States of America, Plaintiff-Appellee, vs. Robert H. Gullett, Defendant-Appellant — No. 81-1536)

Ordered, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

Entered By Order Of The Court
/s/ John P. Hehman, Clerk

Office - Supreme Court, U.S.
FILED
DEC 16 1983
ALEXANDER L. STEVAS,
CLERK

Nos. 83-432 and 83-616

In the Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT H. GULLETT, PETITIONER

v.

UNITED STATES OF AMERICA

MARVIN FOX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. No. 83-432: Whether the district court erred in allowing a government witness to claim the privilege against self-incrimination as to one question during cross-examination.

2. No. 83-616: Whether the admission into evidence of a tape recorded conversation, in which petitioner Gullett was a participant, containing brief references to petitioner Fox constituted plain error.

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In the Supreme Court of the United States

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No. 83-432

ROBERT H. GULLETT, PETITIONER

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A6-A26)[1] is reported at 713 F.2d 1203.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 1983. Petitioner Fox's petition for rehearing was denied on August 31, 1983. The petition for a writ of certiorari in

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[1]"Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 83-432.

No. 83-432 was filed on September 14, 1983, and the petition in No. 83-616 was filed on October 13, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioners were convicted on one count of conspiracy, in violation of 18 U.S.C. 371; one count of racketeering conspiracy, in violation of 18 U.S.C. 1962(d); 13 counts of aiding and abetting the transportation of stolen, converted or fraudulently obtained securities, in violation of 18 U.S.C. 2314 and 2; and four counts of interstate travel in aid of racketeering, in violation of 18 U.S.C. 1952 and 2. Petitioner Gullett was additionally convicted on one count of obstruction of justice, in violation of 18 U.S.C. 1503, another count of transporting stolen securities, in violation of 18 U.S.C. 2314, and four counts of tax evasion, in violation of 26 U.S.C. 7201.[2] Gullett was sentenced to concurrent terms of seven years' imprisonment on the interstate transportation and RICO counts and five years' imprisonment on the remaining counts; Fox was sentenced to concurrent terms of five years' imprisonment on the RICO counts and six years on the remaining counts. Petitioners additionally were each fined $25,000. The court of appeals affirmed (Pet. App. A6-26).

1. The evidence at trial is set out in the opinion of the court of appeals (Pet. App. A6-A12). Briefly, it showed that petitioners, partners in the accounting firm of Gullett, Fox & Boyer, participated with co-conspirator Boyer[3] in a

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[2]At the close of the trial the district court acquitted Fox of obstruction of justice (Tr. 705). The jury also acquitted Fox on one count charging interstate transportation of fraudulently obtained securities.

[3]Wayne Boyer pleaded guilty to a conspiracy count and testified for the government.

scheme to transport from the United States to Canada $300,000 in checks drawn on accounts held by six corporations. The checks were cashed in Canada. Petitioners and their confederates kept a share of the laundered check proceeds, and the remaining funds were pocketed by other co-conspirators or used for various acts of commercial bribery. In all instances the checks were cashed by Robert Davis, a Canadian insurance agent who had a line of credit at a Windsor, Ontario bank.

Twelve counts of the indictment related to petitioners' participation in a check-cashing scheme engineered on behalf of Industrocraft, Inc., a corporate client of petitioners' firm. Joseph Leich, the chief operating officer of Industrocraft, asked petitioners for assistance in generating cash "to take care of some customers" (Tr. 325). On several occasions Leich wrote checks on Industrocraft's account to petitioners' accounting firm, recording the checks in the corporate books as "legal and accounting" expenses. Leich testified that Boyer, Davis and petitioners together took 50% of the face value of the checks and gave Leich the balance. In this manner petitioners arranged for checks totalling approximately $33,300 to be cashed in Canada. Four other Industrocraft checks totalling approximately $35,200 were drawn to Davis or to fictitious payees, and one $11,000 check made payable to Gullett, Fox & Boyer was cashed in the United States without Davis's assistance. Pet. App. A7-A8; Tr. 325-351, 455-465, 574-578.

2. Petitioner Gullett was also convicted of obstruction of justice in connection with his efforts to convince Leich to give false testimony before the grand jury. There was a factual dispute as to the amount of money Leich received back from the fraudulent checks he gave to petitioners' accounting firm to cash for him. Boyer had indicated that Leich received 90% of the face value of the checks; Leich, on the other hand, asserted that he received only one-half.

After Leich received a subpoena to testify before the grand jury, he spoke with Gullett about his upcoming appearance. In an apparent effort to make himself and Fox look less culpable, petitioner suggested that Leich tell the grand jury he received 90% of the full amount. Gullett also offered to pay whatever taxes Leich would then owe on the heretofore undeclared 40%. Leich told his attorney about petitioner Gullett's proposal and, in cooperation with federal authorities, recorded a subsequent conversation in which Gullett repeated his offer and suggestion of perjury. Tr. 353-356; 360-362, 391-395; Gov't Exh. 67. The government also introduced into evidence a scrap of paper bearing Gullett's notations on the amount of money Leich would need to compensate him for the taxes due (Gov't Exh. 69).

ARGUMENT

1. Petitioner Gullett contends (83-432 Pet. 10-21) that the district court erred in allowing government witness Joseph Leich to claim the privilege against self-incrimination as to one question during cross-examination. The court of appeals correctly rejected this claim (Pet. App. A13-A16).

On direct examination, Leich testified that he embarked upon the laundering scheme to generate "cash * * * to take care of some customers" and that he received back only one-half the face amount of each check (Tr. 325, 328, 331, 332, 336, 351). On cross-examination, when asked what he did with his share of the proceeds, Leich testified that he "passed it on to various people who do business with [Industrocraft], to bribe them" (Tr. 378). The government objected to the next question, which sought disclosure of the names of the bribe recipients.

At a sidebar conference, defense counsel urged that the question was relevant to Leich's credibility. Counsel stated that in light of a conflict between Leich and another co-conspirator (Boyer) as to how much money Leich received,

the defense might subpoena the named bribe recipients to explore whether Leich kept the disputed amount or paid it out in bribes (Tr. 379). After the court expressed its concern that the trial would thereby shift to collateral matters, counsel stated that he would not call the named bribe recipients as defense witnesses (Tr. 381, 384).

The court then raised the question of self-incrimination. Leich previously had pleaded guilty to two counts of the indictment and, in exchange, received informal immunity for offenses about which the government had knowledge and Leich had agreed to testify (Tr. 369). The understanding did not include any testimony by Leich concerning his payment of bribes (Tr. 375). Accordingly, Leich's counsel advised that the answers would be incriminating (Tr. 376-377).

Petitioner then urged that Leich had waived his Fifth Amendment privilege by earlier stating that he used the money to pay bribes (Tr. 375-376). Leich's attorney disagreed, stating that "the checks [petitioners are] asking my client about, those are over and done with. The names, however, of the people may, in fact, bring out other events, other criminal events that have nothing to do with those checks or those transactions" (Tr. 376). The court rejected petitioner's waiver claim (Tr. 377) and upheld Leich's claim of privilege, but allowed the defendant to elicit the invocation of the privilege in the jury's presence (Tr. 370-372, 380-382). Five days later, at the close of the government's case, petitioner reargued the point to the court. Again he urged that Leich waived his Fifth Amendment rights when he admitted paying bribes (Tr. 619-620). The district court found that Leich's statement on cross-examination that he paid bribes was not a waiver of his Fifth Amendment right with respect to the identity of the persons he bribed (Tr. 633).

Petitioner Gullett's counsel then asked the court to order the government to immunize Leich so that he could name the bribe recipients (Tr. 622), never suggesting, however, that he intended to call any recipient as a witness. The court declined to order immunity (Tr. 622-624), noting that defendants were pursuing a general attack on Leich unrelated to any issue in the case (Tr. 630, 633). The court did offer to give an instruction on the weight to be given to testimony by a witness who invokes the privilege against self-incrimination, but petitioner declined (Tr. 632-633).

Petitioner's contention (83-432 Pet. 13-16) that the court erred in allowing Leich to assert the privilege is not well-taken. While it is true that, when Leich admitted on cross-examination that he used the money to pay bribes, he thereby incriminated himself with respect to possible state bribery charges, additional details would have subjected him to "a 'real danger' of further crimination." *Rogers* v. *United States*, 340 U.S. 367, 374 (1951).[4] See also *United States* v. *Seifert*, 648 F.2d 557, 561 (9th Cir. 1980); *United States* v. *LaRiche*, 549 F.2d 1088, 1096 (6th Cir.), cert. denied, 430 U.S. 987 (1977). Contrary to petitioner's contention (83-432 Pet. 16) that federal immunity might have protected Leich from state bribery charges, Leich's attorney represented that disclosure of the bribe recipients "may, in fact, bring out other events, other criminal events that have nothing to do with those checks or those transactions" (Tr.

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[4]Under these facts, it is apparent that Leich did not knowingly and voluntarily waive his Fifth Amendment right when he blurted out his incriminatory response. See *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). Consequently, the district court correctly declined to find (Tr. 377, 633) that Leich's admission constituted the kind of waiver that this Court addressed in *Rogers*, *supra*. Moreover, unlike *Rogers*, where "response to the specific question in issue * * * would not further incriminate [the witness]," 340 U.S. at 373, Leich clearly ran the risk of material additional self-incrimination had he responded.

376). Thus, these other unrelated activities would not have been embraced under the informal immunity agreement.[5]

The decision to exclude the names of the bribe recipients is not inconsistent with *Rogers* v. *United States*, 340 U.S. 367 (1951). Even if it be assumed that the fact of the bribes and the names of the recipients are " 'related facts, parts of a whole fact,' " *Rogers* instructs that waiver need not be found unless the " 'whole fact form[s] a single *relevant* topic,' " *id.* at 374 n.16, quoting 8 Wigmore, *Evidence in Trials at Common Law* § 2276 (1940) and *Foster* v. *People*, 18 Mich. 266 (1869) (emphasis added). In this case, neither the bribes nor the identities of their recipients were relevant to the issue of petitioner's guilt. Whether Leich obtained 50% or 90% of the illegally received funds, petitioner would not be exonerated of the Travel Act violations so long as he participated in the scheme. Since the factual conflict over Leich's share did not question petitioner's role (only the amount he received), petitioner's guilt was established under both versions. Thus, the court would have been well within its discretion in excluding that line of cross-examination as irrelevant, as the government contended in its initial objection, even before the Fifth Amendment issue arose. Petitioner disavowed an intent to call the named bribe recipients as defense witnesses (Tr. 381, 384). Hence, the question would merely have elicited names, for no discernible purpose other than to discredit Leich by further

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[5]Because these non-immunized transactions had nothing to do with the checks and transactions involved in this case, petitioner's hypotheticals (83-432 Pet. 20) concerning piecemeal immunity for the charges pending at trial are inapposite. In short, this case is not comparable to a situation where "[t]he Government by its fashioning of the terms of the non-prosecution agreement or immunity order, could cause testimony about the bribing of 'A,' but preclude it about 'B' " (*Ibid.*).

emphasizing that he paid bribes.[6] Leich's criminal disposition to that end was already established, however, as was an additional range of illegal activity involving tax fraud. The proposed impeachment value of this further line of inquiry, directed at Leich's general credibility, thus would have been cumulative at best.[7]

Petitioner Gullett also attacks (83-432 Pet. 16-21) the decision below as fostering improper selective manipulation by the government of its immunity powers. Assuming that "some extraordinary circumstances" may require total immunity "to protect a defendant's right to a fair trial" (*United States* v. *Chagra*, 669 F.2d 241, 258 (5th Cir. 1982)), this is not such a case. The government did not grant immunity only to foster its interests at the expense of petitioner's rights. Rather, the government granted immunity to Leich concerning offenses related to the charges against petitioner, and accordingly made Leich available for cross-examination as to his criminal conduct in that regard. That Leich's credibility was effectively attacked on those grounds is not subject to dispute. And further exploration of the

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[6]Petitioner states (83-432 Pet. 19-20) that "[t]hese alleged bribes were intimately related to the specific charges made against [petitioner] in this trial and to the credibility of Mr. Leich." As the court below properly recognized (Pet. App. A14-A15), though "intimately related" the bribes were not prerequisites to petitioner's Travel Act and Section 2314 convictions. As such, they were basically collateral matters, and the limited restriction imposed on cross-examination here did not pose a "substantial danger of prejudice by depriving [petitioner] of the ability to test the truth of [Leich's] direct testimony." *Fountain* v. *United States*, 384 F.2d 624, 628 (5th Cir. 1967), cert. denied, 390 U.S. 1005 (1968).

[7]And, because Leich was impeached on a variety of matters and the identity of the bribe recipients was collateral to the matters directly at issue, the court of appeals properly upheld the district court's refusal to strike Leich's direct testimony (Pet. App. A16). See *Fountain* v. *United States*, 384 F.2d at 628.

inconsistency between Boyer and Leich concerning how much money Leich received from the check cashing scheme would not have borne on the fundamental issues to be resolved at trial.

When petitioner's negligible need for Leich's testimony naming the bribe recipients is weighed against the significant societal costs of immunizing witnesses, his insistence that government witnesses be given blanket immunity for all past offenses so as to make them impeachable is clearly untenable. That is particularly so where, as here, no conceivable prejudice or unfairness flowed from the *de minimis* restriction on petitioner's ability to challenge Leich's credibility with non-exculpatory and immaterial matters.[8] Accordingly, review of petitioner's claim is unwarranted.[9]

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[8]Thus, petitioner's reliance (83-432 Pet. 17-19) on *Earl* v. *United States*, 361 F.2d 531, 534 & n.1 (D.C. Cir. 1966), and 388 U.S. 921 (1967), *United States* v. *Herman*, 589 F.2d 1191 (3d Cir. 1978), and *Virgin Islands* v. *Smith*, 615 F.2d 964 (3d Cir. 1980) is misplaced. Those cases suggest that immunity for defense witnesses — and by analogy broader immunity for already-immunized government witnesses — may in certain extraordinary cases be necessary to remedy "prosecutorial misconduct" undertaken " 'with the deliberate intention of distorting the judicial fact finding process.' " *Id.* at 968, quoting *United States* v. *Herman*, 589 F.2d at 1204. This is plainly not such a case. Those cases, moreover, require as a threshold matter that the anticipated testimony would be both material and exculpatory, two necessary preconditions that also are not met here. See *United States* v. *Lowell*, 649 F.2d 950, 965 (3d Cir. 1981).

[9]Furthermore, petitioner received concurrent sentences on each count. Because his offense severity rating under the Parole Commission guidelines (28 C.F.R. 2.20) would not change even if his convictions on the counts charging interstate transportation of Industrocraft's fraudulently made securities were reversed, there is no reason for this Court to consider his objection to Leich's testimony, which is limited to only some of the counts on which he was convicted. See *Andresen* v. *Maryland*, 427 U.S. 463, 469 n. 1 (1976); *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973); *Benton* v. *Maryland*, 395 U.S. 784, 791 (1969).

2. Petitioner Fox contends (83-616 Pet. 5-13) that the court below erred in finding that the admission of statements that allegedly violated *Bruton* v. *United States*, 391 U.S. 123 (1968), was harmless in the circumstances of this case.[10] This fact-bound claim is without merit.

The evidence at issue, which was the government's primary evidence on the obstruction of justice count, consisted of a consensually-made tape recording between Leich, who was then cooperating with the government, and Gullett (Gov't Exh. 68). In the recorded conversation, which took place several days before Leich was due to testify before the grand jury, Gullett made four brief references to petitioner Fox: Gullett said that he told petitioner that Boyer was "pretty * * * expensive" and that they didn't need to make any more money this way (Gov't Exh. 68 at 4); that Boyer had more "closed door sessions" in one week than he and Fox have in a year (*id.* at 6); that Fox seemed calm and oblivious to the trouble brewing and continued to do $35 tax returns (*id.* at 8); and that he (Gullett) told Fox that Boyer obtained separate representation to avoid having them find out what he was doing (*id.* at 12). Leich also referred to Fox when he asked Gullett if he and Fox would "cover" him and pay any tax due in the event that Leich falsely testified before the grand jury to receipt of money on the fraudulent checks that he did not claim on his tax returns (*id.* at 14). The day after this recorded conversation, Gullett telephoned Leich to reassure him that he and Fox were still behind Leich (Tr. 371).[11]

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[10]In *Bruton*, co-defendant Evans' confession that he and petitioner Bruton together committed the crime was admitted into evidence. This Court reversed, finding that the confession, which was not subject to cross-examination, "added substantial, perhaps even critical, weight to the Government's case." 391 U.S. at 128.

[11]Petitioner states (83-616 Pet. 4) that during the taped conversation Gullett told Leich that "Marvie and I are behind you. We are still with you." This statement does not appear in the verbatim transcript of the

At the outset, we note that petitioner's *Bruton* complaint was not timely raised in the district court. Petitioner received the transcript of the recorded conversation well in advance of trial (C.A. App. 43a-44a). He did not file a pretrial motion seeking redaction of the tape on *Bruton* grounds, and the only objections made at trial before the tape was played focused on racist comments, the vulgar language used, and Gullett's declaration that he would assert a Fifth Amendment privilege before the grand jury (Tr. 295-311). Several days after the tape was played petitioner Fox sought a mistrial, claiming that this evidence was not admissible against him.[12] He also argued that a limiting instruction would not dissipate the clear prejudice he belatedly claimed to have suffered (Tr. 706-707). The district court denied the motion because petitioner had failed to raise the issue at an appropriate time, when the *Bruton* problem might have been avoided (Tr. 709-710). Petitioner's failure to raise the *Bruton* claim supports our position that any prejudicial impact was insignificant. Cf. *United States* v. *Kahaner*, 317 F.2d 459, 482 (2d Cir. 1963).[13]

In any event, as the court of appeals correctly found (Pet. App. A24-A25), there was no prejudice shown here. Indeed, the challenged statements on their face did not particularly inculpate petitioner. The statement to which petitioner

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conversation (Gov't Exh. 68), which petitioner agreed accurately reflected the recording (Tr. 313). Leich's testimony about the subsequent telephone conversation (Tr. 371) comes closest to conveying those words.

[12]The mistrial motion arose after the court acquitted petitioner Fox of obstruction of justice, the charge to which the tape related most specifically.

[13]Additionally, although petitioner made brief mention of the *Bruton* claim to the district court (Tr. 706-707), he did not argue *Bruton* in the court of appeals. Petitioner's sole claim in that forum challenged the earlier introduction of the statements under Fed. R. Evid. 801(d)(2)(E), relating to co-conspirator statements (Fox C.A. Br. 18-27).

most strenuously objects — Gullett's reassurance that he and petitioner were still behind Leich — is more an expression of friendly support than an admission of co-conspirator involvement. Because the statement, and the other references to Fox in the recorded conversation, were not " 'powerfully incriminating' of or 'devastating to' " petitioner, nor were they "clearly inculpatory" and "vitally important" to the government, there was no reversible error. *United States* v. *Marin*, 669 F.2d 73, 83 (2d Cir. 1982), quoting *Bruton*, 391 U.S. at 135 and *United States* v. *Knuckles*, 581 F.2d 305, 313 (2d Cir.), cert. denied, 439 U.S. 986 (1978); see also *United States* v. *Rubio*, 709 F.2d 146, 155 (2d Cir. 1983); *United States* v. *Winograd*, 656 F.2d 279, 283 (7th Cir. 1981), cert. denied, 455 U.S. 989 (1982); *United States* v. *Halliday*, 658 F.2d 1103, 1105 (6th Cir.), cert. denied, 454 U.S. 1127 (1981); *United States* v. *Tavelman*, 650 F.2d 1133, 1139 (9th Cir. 1981), cert. denied, 455 U.S. 939 (1982).[14]

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[14]Petitioner Fox's claim of prejudice rests on the not wholly correct allegation that the statements constituted the only corroboration of co-conspirator Boyer's testimony. Thus, he refers (83-616 Pet. 9) to other evidence against him as "one very brief, only questionably damaging reference to Petitioner in the testimony of Vincent Mancuso." The record shows otherwise. Mancuso, the owner of an insurance agency, called petitioner Fox on behalf of Bruce Eavenson, a fellow agent, about some dividend checks that Eavenson appropriated before they were sent out to the policyholders. Mancuso asked petitioner how these stolen checks could be cashed; petitioner responded that Boyer would cash them for 25% (Tr. 114-116). Subsequently, Boyer met Eavenson and arranged to cash seven stolen dividend checks (Tr. 131-135, 146). Additionally, Davis, the Canadian insurance agent who cashed the checks, testified that Boyer told him that petitioner Fox knew about all the checks (Tr. 598); he also testified that he saw Boyer divide the money among several envelopes (Tr. 599). In short, petitioner's claim that the statements provided the only corroboration of Boyer's overwhelming evidence — whether or not Boyer's testimony was "inherently suspect" — is hyperbole. The claim is also suspect in light of petitioner's failure to make a contemporaneous *Bruton* objection, something he likely would have done if the evidence were as crucial to the prosecution as he now suggests.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1983

DOJ-1983-12